Supreme Court of the United States.

OCTOBER TERM, 1897.

No. .—ORIGINAL.

TAMPA SUBURBAN RAILROAD COMPANY, a corporation,
Petitioner,

vs.

CENTRAL TRUST COMPANY OF NEW YORK, a corporation,
Respondent.

Brief for Central Trust Company of New York in Opposition to Application for Writ of Certiorari.

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The order to show cause being directed to the Circuit Court, counsel for the Central Trust Company of New York, with the consent of the Circuit Judge, request that the response of the Trust Company may be considered as if it were the return of the Circuit Judge to the order.

On or about July 1, 1895, The Consumers' Electric Light and Street Railroad Company, of Tampa, made a mortgage to the Central Trust Company of New York to secure an issue of bonds amounting to $350,000, all of which are outstanding. This mortgage covers all the property of the Consumers' Electric Light and Street Railroad Company, including all its street railways, franchises and leases, and, among others, all its rights under a lease from the Tampa Suburban Railroad Company covering all the property of this last-named company (See Record).

On July 1, 1897, default was made in the payment of interest then due on the bonds secured by said mortgage, and thereupon the Central Trust Company of New York prepared its bill of complaint for the foreclosure of said mortgage in the usual form, and made parties defendant the mortgagor, the Consumers' Electric Light and Street Railroad Company of Tampa, and also the Tampa Suburban Railroad Company, the latter company claiming some interest in the property covered by the mortgage under a pretended lease claimed to have been made July 15, 1897, after the default in payment of interest above mentioned had occurred (See Record).

The bill of complaint was verified July 21, 1897, and at that time the District Judge for the Southern District of Florida was absent in Maine, Circuit Judge McCormick was absent from the Circuit and in North Carolina, Justice White, of the Supreme Court, was absent in Maine, and Circuit Judge Pardee was at Wadsworth, Ohio (See Record, Affidavit of Knight. Also Answer to Petition, p. 6). The circumstances of the case were such that it was imperative for the protection of the interests of the bondholders that a Receiver should be appointed immediately, and accordingly counsel for the Central Trust Company appeared before Judge Pardee at Wadsworth, Ohio, and presented to him the original bill and exhibit, and asked for the appointment of a receiver, and at the same time the president of both defendant corporations appeared and consented to such appointment. Judge Pardee thereupon granted an order taking jurisdiction of the cause, and directing that cause be shown at Tampa, August 4, 1897, why a receiver should not be appointed, and in the meantime restraining the defandants from interfering with or disposing of the mortgaged property. This order was made July 22, 1897, and entered as of that day (See Record).

This order was served on the defendants, but was disregarded by the officers of the Tampa Suburban Railroad Company, who claimed to hold the property under a pretended lease authorized at a wholly irregular and ineffective alleged meeting of the board of directors, and already set aside when the order of July 22 was served. It became evident that there would be no Judge within the district or the circuit at the time the order to show cause was returnable, the restraining order was wholly disregarded, and therefore on July 27, 1897, notice of motion for a receiver was served returnable before Judge Pardee at Wadsworth, Ohio, on August 2d (See Record. Also Answer to Petition, pp. 3 and 5).

On August 2d counsel for the Central Trust Company, The Consumers' Electric Light and Street Railroad Company and The Tampa Suburban Railroad Company appeared before Judge PARDEE at Wadsworth. An amendment and supplement to the bill of complaint was presented to Judge PARDEE together with a number of affidavits and proofs both on behalf of the complainant and the defendant Tampa Suburban Railroad Company; argument was had, and an order was granted August 3, 1897, appointing Chester W. Chapin Receiver of the mortgaged property. The Consumers' Company, the mortgagor, consented to the appointment.

No appeal has been taken from either of the orders of Judge PARDEE. The defendants have filed answers to the bill. The defendant Tampa Suburban Railroad Company has filed motions to set aside the temporary restraining order of July 22, 1897, and the order appointing receiver of August 3, 1897, but neither of these motions has been brought on for argument (Answer to Petition, pp. 5 and 6).

Since the making of the order above mentioned appointing Chester W. Chapin Receiver of the mortgaged property of the Consumers' Electric Light and Street Railway Company suit has been brought in the Circuit Court of the United States for the Southern District of Florida by the trustees of a mortgage of the Tampa Suburban Railroad Company, securing $50,000 of bonds and covering all the property of that company, and made in 1892, some years prior to the lease from the Tampa Suburban Railroad Company to the Consumers' Electric Light and Street Railroad Company. This last-mentioned suit is brought to foreclose the mortgage of the Tampa Suburban Railroad Company because of default in payment of interest continued since January 1, 1896; and in this suit Chester W. Chapin has also been appointed Receiver, and under such appointment he holds all the property of the Tampa Suburban Railroad Company, which comprises almost all the property covered by the mortgage of the Consumers' Electric Light and Street Railroad Company to the Central Trust Company of New York (Answer to Petition, p. 5).

POINTS.

I.

THE SUPREME COURT HAS NO JURISDICTION TO ENTERTAIN THE APPLICATION.

By this application it is sought to review two interlocutory orders of the United States Circuit Court, made in a suit still pending in said Circuit Court. The Circuit Court of Appeals Act of 1891, provides that in any case that is by the act made final in the Circuit Court of Appeals, the Supreme Court may require such case, by *certiorari*, to be sent to it for its review and determination. But this applies only to cases pending in the Circuit Court of Appeals.

Forsyth vs. Hammond, 166 U. S., 506, 513.

The Supreme Court has only such appellate jurisdiction as is given to it by the acts of Congress, and the appellate jurisdiction so given to it is limited to final judgments at law and final decrees in equity or admiralty. The Supreme Court has no power to review interlocutory orders unless in connection with the review of a final decree.

Hentig vs. Page, 102 U. S., 219.
Keystone Iron Co. vs. Martin, 132 U. S., 91.
American Construction Co. vs. Jacksonville Railway, 148 U. S., 372, 378.
McLish vs. Roff, 141 U. S., 661.

Whether there be power to review interlocutory orders by *certiorari* or otherwise after an appeal has been taken to the Circuit Court of Appeals and the cause is pending therein, it is not now necessary to consider.

By Section 716 of the Revised Statutes the Supreme Court has power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law, and this has been held to include the issuing of the writ of *certiorari*. But the power here given to issue this writ does not include the power to issue it in cases where such issue would be, in effect, but giving an appeal from an interlocutory order, while the whole theory of the Congressional legislation is that no appeal shall lie to the Supreme Court from

such orders. The writ is never used like a writ of error to review the judgment of an inferior court, but only in aid of other methods of review provided by law.

American Construction Co. vs. Jacksonville Railway, 148 U. S., 372, 380, and cases there cited.

The principle is the same as that which has been specifically decided in the case of mandamus to bring up for review a ruling or interlocutory order made in the progress of a cause, and the language of Chief-Justice MARSHALL in

Bank of Columbia vs. Sweeney, 1 Peters, 567, 569,

where it was decided that the Supreme Court would not review an interlocutory order by mandamus, applies well to an attempt to review such an order by *certiorari*.

The Circuit Court of Appeals Act of 1891 contains a provision in Section 7 that in an equity cause an appeal may be had to the Circuit Court of Appeals from an interlocutory order or decree granting or continuing an injunction in a cause in which an appeal from a final decree may be taken under the provision of that act to the Circuit Court of Appeals. This is the only provision for appeals in the Federal courts from interlocutory orders.

This suit is one in which an appeal from a final decree might be taken to the Circuit Court of Appeals. Though it is claimed that the question of the jurisdiction of the Circuit Court is involved, that would not prevent an appeal to the Circuit Court of Appeals from a final decree. Upon such appeal the Circuit Court of Appeals might certify the question of jurisdiction to the Supreme Court.

U. S. vs. Jahn, 155 U. S., 109.

This is therefore a case in which an appeal might have been taken to the Circuit Court of Appeals from the interlocutory orders granting and continuing the injunction in aid of the receivership, and thus there is an express provision of law for the review of these interlocutory orders by appeal. In such a case the Supreme Court will not issue a writ of *certiorari* to review the judgment of an inferior tribunal, another method of review being provided by law.

The writ of *certiorari* is asked in this case not as an aid to any appellate jurisdiction of the Supreme Court. The appellate jurisdiction given to that Court by the Circuit Court of Appeals Act in

cases mentioned in Section 5 can be invoked only in the case of final judgments.

McLish vs. Roff, 141 U. S., 661, 665.

The Supreme Court has original jurisdiction under the Acts of Congress only in certain causes of a public nature arising under the Constitution or treaties, or affecting ambassadors, or in controversies between States. This suit is not one in which the original jurisdiction of the Court may be invoked, for it does not come within the cases specified in the Constitution and the Acts of Congress.

Ex parte Vallandigham, 1 Wallace, 243.

The question involved in this case is not one of jurisdiction of the Circuit Court. There is no doubt of the power of that court to make the orders sought to be reviewed. At most, the question sought to be reviewed is an irregularity in practice, and the case will not fall within Section 5 of the Circuit Court of Appeals Act, providing for direct appeal to the Supreme Court in cases where the jurisdiction of the Court below is in issue. No request has been made in this case that the question of jurisdiction should be certified by the Circuit Court to the Supreme Court.

It is contended that the decision of this Court *in re* Chetwood, Petitioner, 165 U. S., 443, is an authority for the issue of the writ in this case; but in that case the writ was issued to bring up for review certain decrees which were in effect final decrees, and the orders permitted to be reviewed were orders of the Circuit Court interfering with the progress of a cause then pending in the Supreme Court. Manifestly, in a cause so pending, the Supreme Court alone can make orders affecting the cause, and it would not have been competent for the Circuit Court of Appeals, any more than for the Circuit Court, to interfere with the progress of the cause in the Supreme Court.

II.

IF IT BE ASSUMED THAT THE SUPREME COURT HAS JURISDICTION TO ENTERTAIN THIS APPLICATION, THE CASE IS NOT ONE IN WHICH A WRIT OF CERTIORARI SHOULD BE GRANTED.

The writ has not been issued freely by the Supreme Court, and that Court has said that under the Circuit Court of Appeals Act of 1891, allowing the Circuit Court of Appeals to certify questions to it for instruction, and allowing it to require cases pending in the Circuit Court of Appeals to be certified to it for its decision, only questions of gravity and importance should be brought before it.

Lau Ow Bew, Petitioner, 141 U. S., 583, 587.

The writ of *certiorari* to the Circuit Court of Appeals is used only to bring up questions of grave national importance, and cases in which there has been a conflict of opinion between different courts of equal rank.

Forsyth vs. Hammond, 166 U. S., 506, 514.

The writ to the Circuit Court of Appeals has been denied in cases where, there being only a matter of private interest, there has been no final judgment in the Court of Appeals.

Chicago & Northwestern Railway vs. Osborn, 146 U. S., 354; cited in Forsyth vs. Hammond, *supra*.

Still less, then, will the Supreme Court exercise the extraordinary power of taking up by *certiorari*, for review in the Supreme Court, an interlocutory order of the Circuit Court, from which no appeal has ever been taken to the Circuit Court of Appeals.

The petition for the writ and the brief of the petitioner do not set forth any matters of national importance, or any matters upon which there has been a conflict of decision in the courts below.

The first question sought to be raised is as to the power of Judge PARDEE to make the orders while out of his Circuit. The making of an order when out of the Circuit at most would be an irregularity, and the question of the appointment of the Receiver would be brought up again in the Circuit Court and the action reviewed. There has never been any conflict of decision

in the Circuit Courts of Appeal on this point, nor is it a question of any importance in this case. This case, as we shall see, was one of the plainest cases for the appointment of a Receiver, and the question who should be appointed remains within the jurisdiction of the Circuit Court. It was said by this Court, in the case of American Construction Co. vs. Jacksonville Railway Co., 148 U. S., 372, 386, that the question had no material bearing upon that case, and the same is true in the case which we are considering.

The second point sought to be made is that the mortgage in question was not executed according to the laws of Florida, the ground assigned being that the seal is missing. This, as it appears from the answer to the petition, is untrue, though by an error in the copy of the exhibit filed with the bill the copy did not show that the original instrument bore the seal of the Consumers' Electric Light and Street Railroad Company (*Answer to Petition*, p. 2). But if the seal were absent and there were irregularities in the execution of the mortgage, it would be wholly immaterial, for the petitioner had full knowledge and notice of the existence of the mortgage, and recognized it in the pretended lease of July 15, 1897, and the mortgage was executed by E. S. Douglass and John T. Douglass, officers not only of the Consumers' Electric Light and Street Railroad Company, but of the petitioner The Tampa Suburban Railroad Company, and who, as alleged in the answer to the petition, are the real parties prosecuting the application for this writ.

The third point is, in effect, that the mortgage could not be foreclosed for sixty days. There is such a uniform current of decision, not only in this Court, but in all the Circuit Courts, showing that this mortgage could be foreclosed at once upon default in payment of interest, that we are surprised the point should be urged. It is sufficient to call attention to the provisions of Article First of the mortgage, giving the mortgagor possession only until default, and to the fact that there is nothing in the mortgage which takes away the right of the mortgagee, inherent in every mortgage, to foreclose by suit at once upon default in payment of interest or upon breach of condition. The effect of Article Eighth is only to give power to the holders of one-quarter in amount of the bonds to compel the trustee to foreclose after sixty days' default, and that article expressly provides that the rights particularly specified in the mortgage are cumulative to all other remedies allowed by law.

Morgan's Co. vs. Texas Central R. R. Co., 137 U. S., 171, 192.

Mercantile Trust Co. vs. Mo., Kans. & Tex. R. R. Co, 36 Federal Rep., 221.

In any event, if sixty days of grace were allowed before foreclosure could be begun, such a privilege might be, and was, waived by the Consumers' Electric Light and Street Railroad Company, the debtor, it being a personal privilege to it.

Guaranty Trust Co. vs. Green Cove Springs Co., 139 U. S., 137, 143.

The fourth point it is hardly necessary to notice, for it appears from the record that all the papers used upon the application were before the Judge, except the original bill, and that all parties had copies of this. The original bill was submitted to the Judge when the temporary restraining order was granted (See *Record*, also *Answer to Petition*, p 3). The entire record was before the Court and all the counsel, and abundant opportunity was given to examine it.

The fifth, sixth and seventh points are of no importance upon this application. They contain misstatements of fact. It is a matter of discretion with the Judge hearing such an application to allow affidavits and proofs to be filed at the time of the hearing, and full opportunity was given to examine and reply to all affidavits and proofs submitted by the complainants. Nothing was done by the first order granted except to restrain interference with the property over which the Court had taken jurisdiction until the hearing of the application for a receiver. That was all that order purported to accomplish, and it did not accomplish even this, because the petitioners disregarded it. There was the fullest proof submitted that the case was one of danger of irreparable damage by any delay.

We have thus briefly commented on the points made by petitioner's counsel, but would insist that all of them are matters which, if the petitioner sought to review them, should have been reviewed by the appeal which the law provides, or by a motion in the Court which made the orders.

III.

THE ORDERS MADE BY THE CIRCUIT JUDGE WERE IN NO RESPECT AN IMPROPER EXERCISE OF HIS JUDICIAL FUNCTIONS.

Counsel for the Central Trust Company have brought before the Court upon this application the complete record of the cause. The extracts which the petitioners presented are wholly insufficient for a proper consideration of the circumstances under which the orders were granted.

The order to show cause granted by the Court upon this petition is merely to show cause why the petition should not be allowed to be filed, and perhaps it is unnecessary to go into the case as fully as we have done ; but, as petitioners have seen fit in their petition and brief to attempt to bring before this Court the merits of the case, it seems proper that this Court, upon considering the application, should have all the facts before it.

An examination of the record and the answer to the petition will show that the case was one which called most urgently for the interposition of the Court by the appointment of a Receiver. The necessity was extraordinary. There was no Judge of the United States Court in the Circuit, and it was therefore necessary to go to the Circuit Judge out of the Circuit to prevent irreparable injury to the property.

The orders of Judge PARDEE were in no sense void. They were at most subject to review, and could be reviewed by the Court sitting in the District ; and, if the case be one for the appointment of a Receiver, the Court, upon such review, can ratify and confirm the appointment.

> Hervey vs. Illinois Midland R. R. Co., 28 Federal Rep., 169, 172.

The appointment of a Receiver without notice is not a jurisdictional defect, but at most ground for an application to the Court which appointed the Receiver for a review of the order of appointment. In this case, however, the appointment of the Receiver was not made without notice. The parties were represented and had full opportunity to argue the matter and to submit any proof, and did argue the matter fully and submit affidavits and proof. The preliminary order taking jurisdiction granted July 22, 1897, is fully authorized by the Revised Statutes and by the rules of the Court.

It was not made without notice, for the president of both the defendant companies was there and expressly consented. The record shows that it was wholly disregarded by the petitioner.

The cause of action and the foreclosure suit itself would be in no wise affected if the appointment of a Receiver were set aside. The facts certainly justify the appointment of a Receiver, and the Circuit Court could now at any time appoint a Receiver in the suit or ratify and confirm the present appointment, if that be deemed necessary. If there were now no receivership the Court would, upon the facts before it, certainly appoint a Receiver. The person appointed was an eminently proper person to be Receiver. The circumstances of the case are unusual in that one man is almost the sole creditor of the company, holds substantially all the bonds of the company, and all the bonds of the petitioner company, the greater part of the stock of both companies, and has contributed all the money which has gone into the enterprise. The petitioner here has no interest in the property. If the nominal petitioner, The Tampa Suburban Railroad Company, be deemed to be the party making this application, it has no real interest in the property. It is a corporation with a merely nominal existence, which has been leased to the Consumers' Electric Light and Street Railroad Company for ninety-nine years, and all of its property had been for some years delivered over to the Consumers' Company. The pretended lease of July 15, 1897, which was attempted to be made without notice to the real owners of the property, and while they were absent, was evidently a nullity, and in itself such an extraordinary attempt to get the property away from its real owners as would justify the intervention of a court of equity; but the real parties in interest upon this application are E. S. Douglass and John T. Douglass, and not the Tampa Suburban Railroad Company, and E. S. Douglass and John T. Douglass are, as shown by the record, the persons who are really responsible for the insolvency of the defendant companies, and who were for this reason deposed from the management by the owners of the property in January last, although they were, until the receivership, still directors and employees of the companies.

As we have shown, it is not in any way material whether Judge PARDEE's order was invalid, for the reason that it was made by him outside of his circuit. But we submit that it was not invalid, and that he had full power to make the order.

In the case of American Construction Co. vs. Jacksonville Railroad Co., above cited, it was suggested that a somewhat similar question there raised was of interest and importance, though not material; but that question differed from this because it was claimed that at the time Judge PARDEE made the order out of the circuit, the Circuit Court was in session in the district where the suit was pending. That question is a very different one from the one which we are considering. No court was pending in the district when these orders were made; no Judge was in the district or in the circuit. Petitioner's counsel contend that the decision of Mr. Justice BRADLEY in Searles vs. Jacksonville, P. & M. R. R. Co., 2 Woods, 621, is to the effect that a Circuit Judge cannot make an order while out of his circuit. We do not so understand the decision. That question was not before Mr. Justice BRADLEY. He was considering the construction of the Act of 1872, relating to the hearing of cases outside of the circuit by the Circuit Justice of the circuit. By the Act of 1872 the Circuit Justices were prevented from so hearing cases except under certain circumstances. Nowhere in the statutes or the rules is the power to make an order while out of the circuit taken away from the Circuit Judges. By Section 607 of the Revised Statutes the Circuit Judge is given all the powers and jurisdiction of the Circuit Justice in the circuit. This in itself would give the Circuit Judge power to hear outside of the circuit applications which may be heard at Chambers and when the Court is not in session, and these applications which we are considering were applications which may be so heard. The purpose of the Act of 1872 undoubtedly was to relieve the Circuit Justices from the labor of being asked to hear applications, when there were Judges in the district or circuit who might hear them. The language of Judge BRADLEY may have been broader than the circumstances of the case required, but it is in no sense an adjudication that the Circuit Judge cannot hear applications of this nature out of his circuit.

It is imperative to the administration of justice in the Federal Courts that he should be allowed to hear such applications. The magnitude of the questions presented to the Federal Courts has changed since 1873. A very large part of the litigation before these Courts relates to the administration of vast railway systems, the interests involved are enormous, and the litigation is the most important litigation which is conducted in this country. Action in such litigation it is often necessary to

take without the slightest delay, and if it were necessary to wait until the return of Judges from vacation it would be impossible to administer justice in suits of this character. In such litigations counsel are constantly compelled to travel great distances to attend before the Courts, and it is no hardship to request attendance outside of the circuit in cases such as this one, where for a period of many weeks or months there is no Judge within the circuit competent to act. Orders of this character are constantly made without the Circuit upon appearance and consent of parties, and it is evident, that the power to make such orders out of the Circuit exists. Whether they should be so made is at most a question of expediency, and we submit that any regulations tending to prohibit the submission of questions which may properly be heard by a Circuit Judge out of term time and at Chambers to such Judge when out of the Circuit, would seriously hamper the administration of justice in the Federal Courts. The taking into possession of property by a Court through its Receiver is subject to review by the same Court at any time, or by the Circuit Court of Appeals, and this is a sufficient check upon the granting of these orders improvidently.

IV.

The discussion in this brief of the questions involved in the case has been more extended than is required by the order to show cause, the direction of which is merely that cause shall be shown why the petition should not be allowed to be filed. Whether the writ should issue after the petition is filed is another question, but in the petition and the petitioner's brief that question has been discussed at length. It has therefore seemed necessary that counsel for the Central Trust Company should touch upon this question, and that the Court should have before it in considering the matter all the proceedings which were before Judge PARDEE, as well as such other facts as are shown by the answer to the petition.

Leave to file the petition should not be granted, and the writ of *certiorari* should not issue.

If, however, the Court sees fit to go into the whole record and the merits of the case, we feel confident that the Court will not dis-

turb the action of Judge PARDEE in granting the orders sought to be reviewed.

V.

THE APPLICATION SHOULD BE IN ALL RESPECTS DENIED.

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